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OCTOBER TERM, 1980

ST. MARTIN EVANGELICAL LUTHERAN CHURCH AND NORTHWESTERN LUTHERAN ACADEMY, PETITIONERS

v.

STATE OF SOUTH DAKOTA

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH DAKOTA

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

WADE H. McCREE, JR.
Solicitor General

ALICE DANIEL
Assistant Attorney General

MARK C. RUTZICK
F. JAMES FOLEY
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

CARIN ANN CLAUSS
Solicitor of Labor

NATHANIEL BACCUS, III
Associate Solicitor

LOIS WILLIAMS
JOSEPH WOODWARD
Attorneys
Department of Labor
Washington, D.C. 20210

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QUESTIONS PRESENTED

1. Whether the Federal Unemployment Tax Act requires participating state unemployment compensation programs to cover employees of parochial elementary and secondary schools.

2. Whether coverage of employees of parochial elementary and secondary schools in an unemployment compensation program violates the First Amendment.

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INTEREST OF THE UNITED STATES

The Federal Unemployment Tax Act ("FUTA"), 26 U.S.C. 3301 *et seq.*, and related federal laws authorize grants of federal funds to qualifying states for the administration of state unemployment compensation and employment service programs and provide federal tax credits for employers operating within such states. A state qualifies for these benefits within a given taxable year only if the Secretary of Labor certifies on October 31 of that year that the state's unemployment compensation program conforms to the requirements of FUTA. 26 U.S.C. 3304(c).

The decision of the Supreme Court of South Dakota in this case holds that FUTA requires the states, as a condition of certification, to include parochial elementary and secondary schools within the coverage of their unemployment compensation programs. This interpretation accords with that of the Secretary of Labor. Other courts, however, have ruled that FUTA does not require the coverage of such schools and that the statutes of certain states do not cover them. Because of the Secretary's responsibility under the statute to make annual certification decisions, the United States has a strong interest in obtaining a definitive interpretation of the requirements of FUTA.

STATEMENT

Petitioners are members of the Wisconsin Evangelical Lutheran Synod, which operates state-certified parochial schools within the State of South Dakota. Petitioner St. Martin Evangelical Lutheran Church operates an elementary school offering instruction to pupils from kindergarten through the eighth grade (Pet. App. A-38). Petitioner Northwestern Lutheran Academy is a secondary school providing instruction in grades nine

through twelve (*id.* at A-39). The Academy is designed to provide education to persons who intend to enter the Synod's preaching and teaching ministries as well as to provide a general Christian secondary education to students. Approximately 50% of the students who enter the Academy do not plan to become teachers or pastors (*id.* at A-40).

The issue in this case concerns the proper interpretation of the Federal Unemployment Tax Act (FUTA), 26 U.S.C. 3301 *et seq.*, and its implementation through the South Dakota Unemployment Insurance Law, Title 61 of the South Dakota Codified Laws Ann. (1978). These laws are part of the federal-state unemployment compensation system. Under this system, the United States provides grants to state employment agencies and tax credits to employers in states that have adopted unemployment compensation laws that conform to federal standards set forth in FUTA. See also 29 U.S.C. 49d; 42 U.S.C. 501. All 50 states participate in this system. A state is eligible for these benefits only if the Secretary of Labor certifies on October 31 of each year that the state's program conforms with the requirements of FUTA. 26 U.S.C. 3304(c).

Prior to 1976, FUTA permitted qualifying states to exempt from their programs certain types of employment by non-profit institutions, including services performed:

> (1) in the employ of (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches;
>
> (2) by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or

by a member of a religious order in the exercise of duties required by such order;

(3) in the employ of a school which is not an institution of higher education.

26 U.S.C. (1970 ed.) 3309(b). The South Dakota unemployment compensation law contained the same exemptions in almost identical language. In 1976, Congress amended FUTA and repealed the third exemption relating to elementary and secondary schools. Unemployment Compensation Amendments of 1976, Pub. L. No. 94-566, Section 115, 90 Stat., 2670. Thereafter, South Dakota amended its own statute to eliminate the third exemption relating to elementary and secondary schools beginning January 1, 1978, the effective date of the 1976 FUTA amendments. See S.D. Codified Laws Ann. § 61-1-10.4(3) (1978).

The Secretary of Labor has determined that the 1976 amendments to FUTA require that the statutes of qualifying states co er parochial school employees. This determination was communicated in a letter to the Most Reverend Thomas C. Kelley, General Secretary of the United States Catholic Conference (Pet. App. A-4). In May 1978, the South Dakota Department of Labor notified petitioners that the services provided in their schools constituted covered employment subject to the South Dakota Unemployment Insurance Law and therefore that their employees were covered under the state unemployment compensation program. Petitioners took an administrative appeal of this determination and a hearing was held before an Appeals Referee for the South Dakota Department of Labor. The referee ruled that the schools were subject to coverage under the statute, but ruled that pastors and male teachers were exempt from coverage under the second exemption for ministers of a church (*id.* at A-35 to A-45). See S.D. Codified Laws Ann. § 61-1-10.4(2) (1978); 26 U.S.C. 3309(b)(2).

Petitioners sought review of the referee's decision in the South Dakota Circuit Court for the Sixth Judicial Circuit. The circuit court reversed the referee's decision and held that the schools were exempt under the first exemption of the statute (Pet. App. A-25 to A-34). The State appealed, and the South Dakota Supreme Court reversed and remanded with instructions to reinstate the referee's decision (*id.* at A-1 to A-24). The court examined the legislative history of FUTA and concluded that Congress intended to remove the exemption of parochial school employees when it amended the statute in 1976 (*id.* at A-5 to A-9). Accordingly, it held that petitioners' school employees were subject to unemployment coverage. The court further held that the statute, as thus construed, does not violate the First Amendment, noting that it does not conflict with any element of petitioners' religious beliefs and practices and does not foster excessive entanglement between church and state (*id.* at A-9 to A-16).

DISCUSSION

The United States believes that the Supreme Court of South Dakota correctly interpreted FUTA to require that parochial school employees be covered by the unemployment compensation laws of qualifying states. The United States also believes that the court below was correct in upholding the constitutionality of this coverage. However, because of the importance of the questions presented in this case and because of the conflict in interpreting FUTA between the Supreme Court of South Dakota and decisions of the United States Court of Appeals for the Fifth Circuit and the Supreme Court of North Dakota, we submit that the decision below warrants review by this Court.

In *Grace Lutheran Church* v. *North Dakota Employment Security Bureau*, Civ. No. 9719 (June 20, 1980) (Pet. App. A-46 to A-61), the North Dakota Supreme Court held that Section 3309 of FUTA and its "mirror image" (*id.* at A-49) in the North Dakota statute continue to exempt parochial schools from their coverage despite the deletion of the third exemption pursuant to the 1976 amendments. In *States of Alabama and Nevada* v. *Marshall*, 626 F. 2d 366 (1980) (Pet. Supp. App. A-1 to A-6), the Fifth Circuit recently was presented with an appeal from a decision by the Secretary of Labor to deny certification to the States of Alabama and Nevada as a result of the determination by those states that parochial schools were exempt from coverage under their unemployment compensation statutes. The court of appeals held that FUTA continues to exempt parochial schools and set aside the Secretary's decision.

It is important that this conflict over the interpretation of FUTA be resolved expeditiously. The entitlement of thousands of parochial school employees to unemployment compensation, which this Court has noted may be necessary to maintain a newly unemployed worker at subsistence levels (*California Dep't of Human Resources Development* v. *Java*, 402 U.S. 121, 131-132 (1971)), turns upon the proper construction of the statute.[1] The present controversy, however, has broader ramifications that transcend this particular group of employees. FUTA is the heart of the entire federal-state unemployment compensation system. One of the essential

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[1]The Secretary has administrative proceedings pending against eight other states, in addition to Alabama and Nevada, for failure to conform their unemployment compensation programs to the Secretary's interpretation of the federal statute.

elements of that system is uniform application of federal law from state to state, as embodied in the certification of state systems by the Secretary. With the present uncertainty in the proper application of FUTA, conformity determinations by the Secretary, with their attendant consequences for grants to state agencies and tax credits to employers, may vary from state to state depending upon the judicial interpretation of FUTA in effect in a particular state. Thus, the continuing litigation and conflicting results concerning FUTA's coverage pose a serious hindrance to the effective and uniform administration of the nation's unemployment system that can be resolved only by a definitive interpretation of FUTA.

Although this case technically involves the construction of a South Dakota statute, it provides an appropriate vehicle for resolution of the FUTA controversy. The South Dakota Supreme Court made clear in its opinion that it interpreted the state statute as being intended to treat parochial schools in the same manner as did FUTA.[2] Thus, the case involves no independent question of state law; rather, as the court below stated, the statutory question here is the "congressional intent with respect to the repeal of Section 3309(b)(3) of FUTA" (Pet. App. A-5). This case, therefore, squarely presents to this Court the question of the proper interpretation of FUTA, the federal statute. See *United Air Lines* v. *Mahin*, 410 U.S. 623, 630-631 (1973); *State Tax Comm'n* v. *Van Cott*, 306 U.S. 511, 514-515 (1939).

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[2] This general intent is apparent from provisions of the state statute that tie its coverage to FUTA. See S.D. Codified Laws Ann. §§ 61-1-7, 61-1-18.1 (1978).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

ALICE DANIEL
Assistant Attorney General

MARK C. RUTZICK
F. JAMES FOLEY
Attorneys

CARIN ANN CLAUSS
Solicitor of Labor

NATHANIEL BACCUS, III
Associate Solicitor

LOIS WILLIAMS
JOSEPH WOODWARD
Attorneys
Department of Labor

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